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COMMON LAW ASPECTS OF WATER

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This summary is only a general guide. It is not possible to make a definite assertion as to the legal truth of any point covered here since the application of the law usually depends upon the particular circumstances of each case. **Competent legal counsel should be procured for any water right or drainage problem that may arise.**

HISTORICAL BACKGROUND

The aim of Law is to ensure justice and to promote the welfare of people. Justice is not fickle and does not change with the changes in our social and economic life. Law is a heritage from the past and can be expected to remain stable in the future.

The basis for Canadian Law is derived from two sources: (1) **English Common Law** and, (2) **Roman Civil Law** which was the predecessor to the French Civil Code. There are some similarities between them since the Roman Civil Law was the source of some English Common Law. **The Common Law is basic. It always applies and governs except insofar as it may be varied or added to by Statute Law. Statutory authority must always be sought for any variations from Common Law.**

Law may be classified according to origin or according to nature and purpose. According to origin, it may be either (1) Statute Law or (2) Common Law. Statute Law comprises Acts of the Legislature or Parliament to meet the need of the people. Common Law consists of rules, principles and customs established in England and once used as a basis for decision. While it is frequently called Unwritten Law, much of this law is now in written form. Common Law also changes as customs change and as new practices arise. Common Law may be classified as follows:

(a) Case Law, formerly unwritten and now to be found in the published official law reports.
(b) Precedent, a recognized custom or new interpretation of existing law. Once established it becomes law until changed by a higher court.
(c) Equity may be based on no precedent and was formerly a ruling based on an appeal to the King. Presently these are given in the Court of Chancery.

Law is also classified according to nature and purpose. The chief divisions on this basis are: (1) Criminal, (2) Civil, (3) Military, (4) Martial and (5) International Law. The Criminal Law is contained in the Canadian Criminal Code and a crime is punished by the State. To constitute a crime there must be both a criminal act and a guilty mind. That is, there must be criminal intention, criminal negligence or malice aforethought.

Civil Law is private law and deals with private rights and obligations. These include: (1) Contractual Rights; (2) Property Rights and (3) Torts.

A Tort is a wrong against an individual and includes acts or omissions of acts which cause actual loss or injury and infringement of the legal rights of others but do not cause actual damage. Since a Tort is a civil wrong against an individual, it is the person who suffers loss or injury who must initiate legal action. Examples of Torts may be defamatory statements, breach of contract, injury caused by dangerous animals, trespass, private nuisances and negligence. A private nuisance is committed when a person uses his own property in such a way that he causes damage to the property of some other person, or interferes with another's legal rights and personal comfort. Where a nuisance arises out of an act authorized by Law, there is no right of action.

An easement is a right annexed to land to utilize other land of different ownership in a particular manner, or to prevent the owner of such other land from utilizing his land in some manner; but does not involve the taking of any part of the natural produce of that land or of any part of its soil. Easements can be created only by Grant or Statute. Creation of an easement by Grant may be either by: (1) express consent (2) implied grant, or (3) prescription. A prescriptive right may be established by a court on the ground of long and open use which was uninterrupted and undisputed and not by any implied or express permission of the other owner.

The Statute of Limitations places a minimum of 20 years on the above use for water rights without interruption or formal protest by the party concerned.

Remedies for Torts

All infringements of the rights of water, natural or acquired, come under trespass or nuisance. A private nuisance may be removed or abated by the party aggrieved if it can be done peacefully. The remedy by act of law for infringement of water rights is by injunction or mandamus.

There is no distinction in the Common Law between the rights of a corporation and the rights of a private landowner. A Municipal Corporation at Common Law has no greater rights or obligations than other landowners.

NATURAL WATERCOURSES

Almost the whole law of watercourses is founded on the maxim of the Common Law, "Aqua currit et debet currere," water flows naturally and should be permitted thus to flow.

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A natural watercourse is defined generally as a stream of water which flows along a defined channel, with beds and banks, for a sufficient time to give it substantial existence. This may include streams that dry up periodically.

A natural watercourse does not cease to be such if at a certain point it spreads out over a level area and flows for a distance without defined banks before flowing again in a defining channel.

A riparian owner is one whose land is in actual contact with the stream of water. The Riparian Doctrine of water rights is apparently in effect in Ontario with respect to natural watercourses.

A riparian owner is not only entitled to have the water of a stream passing through his land flow to him in its natural state, so far as it is a benefit to him, but he is also bound to submit to receive it so far as it is a nuisance to him by its tendency to flood his land. Unless, therefore, the flow of the stream is increased or diverted to his prejudice by some unauthorized act, by the proprietors above or below him, he has no remedy but must submit to what is the result of natural causes. Thus, where a stream becomes by natural causes silted up or choked by weeds, and in consequence overflows adjoining lands, there is no common law liability on the owner to clear the channel or to compensate the adjoining owners who may be damaged thereby. The utmost extent of the obligation imposed upon the owner of lower land is not to alter the condition of it, so as to interfere with the enjoyment of the easement by the high land. This obligation, however, applies only to the water which flows naturally without the art of man. If any person above or below makes any change in the natural flow of a stream to the material injury of the owner situated upon it, or by any interference shall prevent the stream from flowing as it was wont to flow, to such injury, he is liable for the damage he may occasion.

Any landowner whose lands abut upon a natural watercourse has the right to drain those lands into the natural stream, except the riparian land owner may not bring waters into a natural watercourse which have not fallen upon the lands located in the watershed. He may not sell or assign the right to drain into a natural watercourse. He may collect the water, whether it be in ditches or in proper drains and he may discharge it into the watercourse. This is so even though the result is to increase the volume of the stream and to accelerate its rate of flow.

If a riparian owner raises the level of his land by filling or structures in order to protect it from flooding, he may be deemed to have interfered with the natural channel of the stream and if it can be shown that his protective works have diverted the stream or caused flooding of the lands of another, then he has interfered with the channel and will be liable for the resulting damage.

The principle of the Common Law is that it is the duty of anyone who interferes with the course of a natural stream to see that the works which he substitutes for the channel provided by nature are adequate to carry the water which may be brought around even by extraordinary rainfall.

Where a natural watercourse becomes part of an artificial drainage system it is no longer immune under the law, so the entire system must have a safe and proper outlet. Riparian owners may make reasonable use of a stream as it flows past as an outlet for drainage of their own land for agricultural purposes.

Generally a riparian owner has a proprietary right to have the water flow to him in its natural state neither increased nor diminished in quantity or quality. He is also entitled to use it for domestic or natural uses. He may use it for extraordinary purposes if he does not interfere with the rights of others. He may use it for irrigation purposes or divert it on his own land, if he returns it opposite his own land, less what has naturally been absorbed; but the quantity he may take depends on the condition that he must not injure lower owners.

A riparian owner has the right to waterpower from flowing water. In Ontario no dam may be constructed until the plans have been approved by the Lieutenant Governor in Council. The Minister may also authorize the removal of obstructions in the public interest.

The pollution of water is an indictable nuisance. The injured owner need not show damage but merely breach of his rights. The right to pollute may be gained by prescription.

WATER HAVING NO DEFINED COURSE

The principles of law which regulate the rights of owners of land in respect of water flowing in known and defined channels, whether upon or below the surface of the ground, do not apply to water which runs in no defined channel, or merely percolates through the strata and no action will, therefore, lie for the abstraction or diversion of such water.

No right of drainage of mere surface water exists as long as the flow is not in a defined channel. An owner of lower land may, at his own choice, either allow water from higher land to flow over it or keep such water off his property by dams or banks.

SUMMARY OF NATURAL DRAINAGE RULES

1. A natural watercourse must not be obstructed or diverted.
2. Surface water must not be collected and diverted to land that would not naturally receive it.
3. The point of entry of surface water on lower land must not be changed.
4. Water must not be brought in from another watershed.
5. Cannot accelerate the flow of water to the material damage of lower land.
6. Low land may be filled and the water forced out into natural channels.
7. Municipalities must not drain into private drains.

Drainage Acts are statutory and have enlarged on owner's right to improve his drainage beyond the point permitted by the Court's interpretation of the Common Law but has not curtailed the Common Law rights of riparian owners.

UNDERGROUND WATERS

The concept of underground waters is often referred to as the English Rule and is based on the concept of absolute ownership. The rights to use this water for irrigation are more secure than is a surface source. The owner of land containing underground water which percolates by undefined channels and flows to the land of a neighbor has the right to use for any purpose, divert, appropriate or sell the percolating water within his own land so as to deprive his neighbor of it. No action will lie where water which has actually percolated into, and is in the well, has been abstracted by operations in the adjoining land.

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